

DALAM MAHKAMAH TINGGI MALAYA DI SHAH ALAM
DALAM NEGERI SELANGOR DARUL EHSAN
(GUAMAN SIVIL NO: BA-22NCVC-290-07/2019)

ANTARA

EFCO (MALAYSIA) SDN BHD
(No. Syarikat : 410698-M)

.....PLAINTIF

DAN

1. SKYSCAPE INDUSTRIES (M) SDN BHD
(No. Syarikat : 343782 – T)
2. SOO MENG KWI
(No. K/P : 770209-04-5471)
3. WONG CHEE FAH
(No. K/P : 570913-08-6369)
4. LAM KEK BOON
(No. K/P : 7030220-01-6595)

.....DEFENDAN-DEFENDAN

JUDGMENT

There were 3 Applications before me. The first is in Enclosure 9 which is the Plaintiff's application for summary judgment pursuant to Order 14 r 1 ROC 2012 against the 1st Defendant.

The 2nd application is in Enclosure 11. This is the Plaintiff's application to strike out the 1st Defendant's counterclaim filed against the Plaintiff.

The 3rd application is in Enclosure 13 which is the Plaintiff's application for summary judgment under Order 14 r 1 ROC against the 2nd, 3rd and 4th Defendants.

I have allowed all three of these applications. These are my full reasons for my decision.

Salient Background Facts

The Plaintiff is at all material times in the business of renting and/or selling formwork systems and related equipment. The Defendant is a company which specializes in building/construction works.

Sometime in the month of October 2017, the representatives of the Plaintiff and the Defendants attended a meeting whereby its purpose was to explore the prospects of the 1st Defendant renting the Plaintiffs form work and related equipment which were to be used in a highway building project known as "SUKE Highway". The 1st Defendant was a sub-contractor in the said building project.

The discussions from the said meeting culminated in the Plaintiff and the 1st Defendant entering into several Rental Agreements with the Plaintiff. The Plaintiffs agreed to supply the 1st Defendant with formworks and other related equipment for the use of the 1st Defendant's project in SUKE. There was subsequently another project in which the 1st Defendant was involved

in i.e. the MAJU Expressway (MEX 2). The agreement included this project too. The agreements can be seen in Paragraphs 7 and 8 of the Plaintiff's Affidavit in Support.

It is not in dispute that the 2nd to 4th Defendants are guarantors to the said agreement having agreed to guarantee payment of any sums due and owing by the 1st Defendant to the Plaintiff. They each had signed a Personal Guarantee and Indemnity in consideration for the Plaintiff agreeing to enter into the aforesaid Rental Agreements. These Personal Guarantee and Indemnity documents can be found in the 2nd Affidavit in Support filed by the 1st Defendant.

Following the said Rental agreements the Plaintiff supplied its formworks and other equipment to the 1st Defendant at the allotted project sites under each of those agreements.

From the documents exhibited it is noted that the 1st Defendant's representatives had acknowledged receipt of all the Delivery Orders. All Delivery notes were signed and acknowledged without any qualification or complains on the part of the 1st Defendant. Furthermore none of the deliveries were rejected or sent back to the Plaintiff.

In the beginning the 1st Defendant effected smooth payment to the Plaintiff. However the 1st Defendant defaulted on subsequent payments starting from April 2018 onwards and this resulted in the Plaintiff taking the decision to withhold supply of the remaining orders of formwork and equipment from September 2018.

As a result of that the representatives of the Plaintiff and the Defendant held discussions to resolve the matter. As a result of these discussions the Plaintiffs were persuaded to extend indulgence to the 1st Defendant and the Plaintiff continued to supply the formwork and equipment that was withheld earlier on. The 1st Defendant on their part agreed to regularize payment to the Plaintiff. However the Plaintiff only received RM50,000.00 from the 1st Defendants. The payment of RM50,000 was done in the form of cheques.

Meanwhile the plaintiff discovered that the 1st Defendant's contract with its main sub-contractor, Jetson Construction Sdn Bhd had been terminated. After holding a meeting between the Plaintiff, the 1st Defendant and the representatives of the main contractor, it was agreed that Jetson Construction Sdn Bhd (Jetson) would take over portions of the current rentals of the existing formwork equipment and/or related accessories at both project sites.

Subsequently the Plaintiff's solicitors issued a letter of demand against the 1st Defendant for outstanding rentals and for the costs of the balance of formwork equipment that were not included in the ones rented by Jetson and which had not been returned by the 1st Defendant.

In their reply via their solicitor's letter to the Plaintiff, the 1st Defendant, whilst denying the claim had at the same time requested for the parties to engage in further discussion to resolve the matter between them.

As a result of their discussions the Plaintiff agreed to allow the 1st Defendant more time to collect and return the balance of the formwork not

transferred to Jetson. After a while the returns petered out and the Plaintiff had on their own accord gone to the project site to retrieve whatever formworks they could find at the project sites without any assistance from the 1st Defendant. The Plaintiffs could not retrieve all the formwork that were supplied to the defendant and hence they were written off as lost equipment.

After taking into account all of the above the Plaintiff claimed for the sum of RM1,857,067.84 being the sum which included the rental, replacement cost for formwork lost/damaged, also taking into account the formwork that was salvaged and returned to the Plaintiff.

The Plaintiff sent several letters of demand to each of the Defendants but no payments were received thereafter.

The Plaintiff filed this instant suit against all the Defendants seeking to recover the amount due and owing by them to the Plaintiff, interests and costs.

The Law

Pursuant to Order 14 rules 1 and 2 of the ROC 2012, in an application for summary judgment it is incumbent on an applicant seeking the same to prove the following :-

- (i) The statement of claim has been served on the defendant;
- (ii) The defendant has entered appearance; and
- (iii) The applicant has affirmed an affidavit verifying the facts on which the statement of claim is based.

The applicant is also required to affirm his belief that the Defendant has no defence to the statement of claim. Upon fulfillment of the above preliminary requirements the burden is on the Defendant to prove under O14 rules 3 and 4 of the ROC 2012 that there is an issue or question in dispute which ought to be tried (**National Company for Foreign Trade v Kayu Raya Sdn Bhd [1984] 1 CLJ (Rep) 283; Cempaka Finance Bhd v Ho Lai Ying & Anor [2006] 3 CLJ 544**).

An application for summary judgement may also be dismissed by the court if the Defendant satisfies the court that there ought for some other reason to be a trial namely there are circumstances that ought to be investigated by the court (**United Merchant Finance Bhd v Majlis Agama Islam Negeri Johor [1999] 2 CLJ 151**).

This court is mindful of the principles laid down in **Bank Negara Malaysia v Mohd Ismail & Ors [1992] 2 CLJ 151** where it was held as follows :

"In our view, basic to the application of all those legal propositions, is the requirement under O 14 for the court to be satisfied on affidavit evidence that the defence has not only raised an issue but also that the said issue is triable. The determination of whether an issue is or is not triable must necessarily depend on the facts or the law arising from each case as disclosed in the affidavit evidence before the court. Under an O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in

itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O 14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue."

Whether the issues raised by the Defendants are triable

Based on the 1st Defendant's Statement of Defendant and Counterclaim and through their Affidavit in reply, the issues in which the 1st Defendant say are triable are summarized as follows :-

- (i) The Plaintiff's claim is premature;
- (ii) The Plaintiff has unjustly enriched itself by charging rental on the formworks that had been rented out to Jetson;
- (iii) The Plaintiff had failed to supply the formwork and related equipment in full and within the agreed schedule and/or within reasonable time;
- (iv) The formwork supplied by the Plaintiff were defective and thus had failed to replace them within a reasonable time; and
- (v) The statement of accounts prepared by the plaintiff were inaccurate.

Findings of the Court on Enclosure 9

Upon a proper scrutiny of all the documents and accounts exhibited in this case, I could not help but come to the conclusion that there were no serious triable issues which would warrant a full trial to be held. Having

perused the attached exhibits such as the emails enclosed it showed that the 2nd Defendant being the main representative of the 1st Defendant had acknowledged and confirmed the amount owed by the 1st Defendant. Over and above this, the 2nd Defendant had assured the Plaintiff that all outstanding sums would be settled.

I refer to the email labelled as Exh JO-3 in the Plaintiff's Affidavit in Reply which showed the email exchanges dated 26.9.2018 and 19.10.2018 between the Plaintiff's representative and the 2nd Defendant. Nowhere in the email were there any complains of inaccuracies in the amount computed by the Plaintiff to be owing. The 1st Defendant was accepting of the situation and did not raise any issues or discontentment to the Plaintiff. The reply by the 2nd Defendant mentioned the excuse that the company was experiencing cash flow problems and promised settlement of all the outstanding amounts.

The 1st Defendant made payments by 3 post dated cheques amounting to RM50,000 to the Plaintiff. From the exchange of correspondences it would seem that the 1st Defendant recognized that it owed the Plaintiff the amount claimed. I refer to the letter dated 17.4.2019 attached to the Plaintiff's Affidavit in Reply in Enclosure 18 (Exh SJ 1) where the exchange of correspondences showed that the 1st Defendant acknowledged that monies were owed but sought discounts and waivers of rental. Some extracts are as follows :

"Besides, we wish to request your kind consideration on the discount of 50% on DBR and URE, instead of 15% discount.

For the outstanding debts, we request a period of (24) monthly installments and the first installment start on July 2019, due to currently we are out of cash flow and our new project target start date on June 2019."

These are clear admissions of indebtedness and willingness to pay. How can the 1st Defendant now turn around and say that they do not owe anything to the Plaintiff.

Secondly the 1st Defendant had previously effected payments on the invoices sent to them without any qualification or conditions. There is evidence of the 1st Defendant making payments by 3 post dated cheques amounting to RM50,000. I am in agreement with the contention of learned counsel for the Plaintiff that the Defendant is now stopped from disputing the invoices. While the 1st Defendant had in their affidavit in reply claimed that the Plaintiff had failed to complete the delivery of the formwork and equipment yet they had made payments in spite of that. Their conduct at the material time was to accept they were owing the sum claimed by the Plaintiff. It is noted that payments were made throughout the course of the rental period and up until November 2018. Clearly the 1st Defendant is estopped from disputing the amount owed.

I refer to the case of **Boustead Trading (1985) Sdn Bhd v Arab-Malaysia Merchant Bank Bhd [1995] 3 MLJ 331**, where the learned Judge opined that estoppels applied because :

"A reasonable man similarly circumstanced as the respondent would have been entitled to assume, as the respondent did, that the appellant was agreeable to the imposition of the 14 day limit. Influenced – and we use that term deliberately – by the conduct of the appellant, the respondent paid out on those very invoices. This the respondent would not have done had the appellant protested. The appellant's attempt to raise this point some seven months later, well after the respondent had paid out its money to Chemitrade, must, in our judgment be classified as unconscionable and inequitable conduct. It ought not, therefore, to be permitted to question the validity of the endorsement."

I tend to agree with counsel for the Plaintiff's contention that all the allegations raised thereafter by the 1st Defendant are merely afterthoughts raised only to avoid payment of the sum owed.

As to the issues raised in paragraphs (i) to (v) I find that these are not issues worthy of a trial for the reason that no documentary proof were advanced to support this contention. They appear to be bare assertions without any basis.

The contention that the Plaintiff's claim is premature due to ongoing negotiations at the time of the instant proceedings were filed is quite untenable. There is no documentary proof of such negotiations that were supposed to have been carried out. What can be seen thought is the Plaintiff's consistent demands for the amount owed to be paid.

Likewise the allegation that the Plaintiffs were unjustly enriched even after transferring the formworks to Jetson is without proof. The plaintiff has

averred that these are the amount owing by the 1st Defendant after taking into account the set offs made for the equipment returned and those taken over by Jetson from the exhibits shown it is pertinent to note that the charges for rental were halted after the transfer to Jetson was effected.

The 1st Defendant has complained that the Plaintiff failed in their duty to deliver full sets of the formwork and related accessories. The deliveries were late and not within the scheduled times.

The 1st Defendant blamed the Plaintiff as the reason for the termination of their contract with Jetson. The 1st Defendant referred to a letter dated 15.11.2018 (Exh SMK 5) which the 1st Defendant says is evidence of all their complains to the Plaintiff.

Counsel for the Plaintiff exhorted the court to closely peruse the said letter which he said merely made references to uncompleted delivery of materials concerning the project without specifying what materials had been delivered. Counsel pointed out that the said letter did not specify the Plaintiff as the defaulting party. I agree with that contention. In my respectful opinion the said letter not only did not identify the Plaintiff but did not pin the blame on a specific party for the uncompleted delivery of materials. It is pertinent to note that the words stated were that there was uncompleted delivery of 'material'. What exactly were these 'material' was not explained nor specified. The 1st Defendant even pointed the finger of blame on Jetson as being a major reason to request for waiver of rental. Hence I would refuse to accept this reason raised by the Defendants.

There is a letter dated 16.11.2018 found in Exhibit SMK 2 in the 1st Defendant's Affidavit in Reply which in my opinion drove the nail into the coffin so to speak. In this letter from the 1st Defendant to Jetson it speaks of the real cause of the 1st Defendant's inability to complete the subcontracting works. The real cause of the 1st Defendant's problem was because they were experiencing insufficient funds and cash flow. It is worthwhile to note that the 1st Defendant did not at any time blame the Plaintiff for their woes.

I am of the view after carefully considering the facts of the case and the various documentary evidence advanced that the Plaintiff has succeeded in fulfilling the threshold for summary judgements to be allowed. I am satisfied that the summary judgement application is properly before the court and that the Plaintiff has complied with all the procedural requirements as set out in **Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading & Anor [2006] 2 MLJ 685**. I hold that the 1st Defendant had failed to raise any issue that would merit a full trial. There is no need for a hearing of all the evidence of the parties. This is a most suitable case for an order allowing summary judgement in favour of the Plaintiff.

Findings of the Court on Enclosure 13

As for the 2nd to 4th Defendants, they had relied mainly on the issues raised by the 1st Defendant in opposing the application for summary judgement against them. They stood as guarantors of the 1st Defendant. Under the Guarantee signed by them the 2nd – 4th Defendants undertook to be responsible for the debt owed by the 1st Defendant to the Plaintiff. In addition the Joint and Several Guarantees signed by them indicated that

they had agreed to be bound by a conclusive evidence clause. The Plaintiff had exhibited a Certificate of Indebtedness in their supporting Affidavit. I could not see any evidence in the claim by the 2nd to 4th Defendant that there was manifest error in the accounts done by the Plaintiff. The summary of invoices exhibited in the Plaintiff's Affidavit in Reply showed the differential sum complained of by the Defendants. Having considered that issue in light of the certificate of indebtedness I find that the contention by the 2nd – 4th Defendants to be baseless and without merit. Since the Defendants have signed a joint and several Guarantee they are bound by the strict terms thereof and I would therefore allow the Plaintiff's claim for summary judgement against the remaining Defendants.

Findings of the Court on Enclosure 11

Coming now to the notice of application by the Plaintiff to strike off the 1st Defendant's counterclaim, there is to my mind a plain and obvious case in favour of the Plaintiff based primarily on all the reasons already advanced above.

It is trite that the court will only exercise its powers under any of the four limbs of Order 18 r 19(1) if it is a plain and obvious case. This has been aptly stated in the case of **Bandar Builders Sdn Bhd v United Malayan Banking Corporation Sdn Bhd [1993] 4 CLJ 7 :**

"[1] The principles upon which the Courts act in exercising its power under any of the four limbs of O.18 r.19(1) Rules of the High Court 1980 are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule. This summary procedure

can only be adopted when it can be clearly seen that a claim or answer is on the fact of it obviously unsustainable."

Having given summary judgment in favour of the Plaintiff against the 1st Defendant in Enclosure 11 it is inevitable that the 1st Defendant's counterclaim should automatically crumble and fall alongside. I hold that the 1st Defendant's counterclaim is unsustainable in law and discloses no reasonable cause of action. In light of the decision of this court in the summary application, it will follow that the 1st Defendant does not have a sustainable counterclaim.

The allegations in the counterclaim in particular Paragraphs 51 to 53 whereby the 1st Defendant has pleaded a contingent claim against the Plaintiff based on whether Jetson will pay them the sum allegedly owed to them cannot stand. It smacks of uncertainty and speculation. I accept counsel for the Plaintiff's contention that this court is being asked to decide on the 1st Defendant's claim on the presumption that Jetson has already refused to pay them. In this case there is no evidence that Jetson has refused or failed to make any payment. The 1st Defendant has not shown any document to this effect hence I find at this point in time there is no cause of action for the 1st Defendant to base its claim against the Plaintiff.

Conclusion

Finally having evaluated the facts and the law and after giving serious consideration to the contents of the written submissions filed by both sides, I have determined that Enclosures 9, 11 and 13 are adjudged in favour of the Plaintiff. As such I entered summary judgement against all the

Defendants. I also allowed the striking out application of the 1st Defendant's counterclaim. All the applications are allowed with costs to the Plaintiff.

Dated 28 February 2020.



(DATO' JULIE LACK)
Judicial Commissioner
High Court of Malaya
Shah Alam, Selangor Darul Ehsan

Counsel

For the Plaintiff :

Eugene Choong (*MESSRS. P C CHOONG & COMPANY*)

For the Defendant :

Mohd Ali Redha with Ummi Salhah (*MESSRS. LUA & MANSOR*)